

**MINUTES
URBAN COUNTY PLANNING COMMISSION
ZONING ITEMS PUBLIC HEARING**

February 27, 2014

- I. **CALL TO ORDER** – The meeting was called to order at 1:30 p.m. in the Council Chamber, 2nd Floor LFUCG Government Center, 200 East Main Street, Lexington, Kentucky.

Planning Commission members present: Will Berkley; Carla Blanton; Patrick Brewer; David Drake; Karen Mundy; Mike Owens; Frank Penn; Carolyn Plumlee; and Bill Wilson. Absent was Mike Cravens

Planning staff members present: Chris King, Director; Bill Sallee; Barbara Rackers; Jim Marx; Rob Hammons; Traci Wade; Tom Martin; and Stephanie Cunningham. Other staff members present were Tracy Jones, Department of Law; Tim Queary, Urban Forester; and Greg Lengal, Division of Fire and Emergency Services.

- II. **CORRECTION OF MINUTES** – A motion was made by Ms. Plumlee, seconded by Mr. Penn, and carried 9-0 (Cravens absent) to approve the correction to the December 19, 2013, meeting minutes.

- III. **POSTPONEMENTS AND WITHDRAWALS** – No such items were presented.

- IV. **LAND SUBDIVISION ITEMS** - The Subdivision Committee met on Thursday, February 6, 2014, at 8:30 a.m. The meeting was attended by Commission members: Eunice Beatty, Will Berkley Mike Owens, and Carolyn Plumlee. Committee members in attendance were: Hillard Newman, Division of Engineering; and Casey Kaucher, Division of Traffic Engineering. Staff members in attendance were: Barbara Rackers, Tom Martin, Cheryl Gallt, Dave Jarman, Kelly Hunter, Denise Bullock, Jimmy Emmons, Traci Wade, Scott Thompson, and Cindy Deitz, as well as Lieutenant Greg Lengal, Division of Fire & Emergency Services and Ed Gardner, Department of Law. The Committee made recommendations on plans as noted.

General Notes

The following automatically apply to all plans listed on this agenda unless a waiver of any specific section is granted by the Planning Commission.

1. All preliminary and final subdivision plans are required to conform to the provisions of Article 5 of the Land Subdivision Regulations.
2. All development plans are required to conform to the provisions of Article 21 of the Zoning Ordinance.

A. DEVELOPMENT PLAN

1. DP 2013-96: HARVEY PROPERTY (2/27/14)* - located at 4500, 4524 and a portion of 4574 Old Schoolhouse Lane.
(Council District 10) **(EA Partners)**

Note: The Planning Commission postponed this plan at their December 12, 2013, and January 16, 2014, meetings.

The Subdivision Committee Recommended: Postponement. There were some questions regarding access to the greenway, location of the pre-Columbian burial ground and adequate spring protection.

Should this plan be approved, the following requirements should be considered:

1. Urban County Engineer's acceptance of drainage, storm and sanitary sewers and floodplain information.
2. Urban County Traffic Engineer's approval of street cross-sections and access.
3. Building Inspection's approval of landscaping and landscape buffers.
4. Addressing Office's approval of street names and addresses.
5. Urban Forester's approval of tree preservation plan.
6. Department of Environmental Quality's approval of environmentally sensitive areas.
7. Bike & Pedestrian Planner's approval of bike trails and pedestrian facilities.
8. Greenspace Planner's approval of the treatment of greenways and greenspace.
9. Division of Fire, Water Control Office's approval of the locations of fire hydrants, fire department connections and fire service features.
10. Division of Waste Management's approval of refuse collection locations.
11. Documentation of Division of Water Quality's approval of the Capacity Assurance Program requirements, prior to plan certification.
12. Denote lot information per Subdivision Regulations for single family area.
13. Clarify extent of street construction and tree protection area in and near floodplain.
14. Discuss proposed tree protection area for Bur Oak.
15. Discuss location of pre-settlement cultural site.
16. Discuss access to greenway area.
17. Discuss improvements needed to Old Schoolhouse Lane, including sidewalk.
18. Discuss incorporation of spring into greenway or other protection measures, including maintenance.
19. Discuss requested waivers, and the height of proposed retaining walls.

* - Denotes date by which Commission must either approve or disapprove request.

Chairman Comments: Mr. Owens stated that there were three items on today's agenda, each of which could generate a great deal of discussion. He stated that the Commission would be imposing time limits, and asked that each speaker be respectful of others and avoid being repetitive if possible.

Staff Presentation: Mr. Martin presented this revised Final Development Plan, briefly orienting the Commission to the location of the subject property at the intersection of Harrodsburg Road and Old Schoolhouse Lane. He noted that, although the plan has been revised, it is very similar to the preliminary development plan that was approved by the Commission at the time of the rezoning of the subject property in 2013.

Mr. Martin stated that the applicant is proposing to construct seven apartment buildings, with 196 units, a clubhouse, pool, and associated off-street parking. The plan also depicts 42 single-family lots, as well as the street system to serve the area. A large open space area is proposed in the established floodplain along South Elkhorn Creek in this vicinity.

Mr. Martin stated that there had been a great deal of concern about several different characteristics of the subject site, including the steep slope at the front of the property along Old Schoolhouse Lane, and the historic bur oak tree. He said that there were also concerns about the proposed extension of Twain Ridge Drive, which is the primary collector street in that area, and the future connection of Agape Drive. The plan was revised based on the concerns about the bur oak tree and steep slopes. The original plan depicted the new street and access point in a different location, which would have created concerns about slope and created the need for a waiver of the Land Subdivision Regulations. That configuration also could have more heavily impacted the bur oak tree, due to the depth of the cuts necessary to construct the street. This revised version of the plan depicts the street as dropped lower and further away from the tree, which eliminates the slope issues and any need for a waiver to those Subdivision Regulation requirements.

Mr. Martin said that, since the submission of this revised plan, the staff had drafted the following revision to the conditions:

1. Urban County Engineer's acceptance of drainage, storm and sanitary sewers and floodplain information.
2. Urban County Traffic Engineer's approval of street cross-sections and access.
3. Building Inspection's approval of landscaping and landscape buffers.
4. Addressing Office's approval of street names and addresses.
5. Urban Forester's approval of tree preservation plan.
6. Department of Environmental Quality's approval of environmentally sensitive areas.
7. Bike & Pedestrian Planner's approval of bike trails and pedestrian facilities.
8. Greenspace Planner's approval of the treatment of greenways and greenspace.
9. Division of Fire, Water Control Office's approval of the locations of fire hydrants, fire department connections and fire service features.
10. Division of Waste Management's approval of refuse collection locations.
11. Documentation of Division of Water Quality's approval of the Capacity Assurance Program requirements, prior to plan certification.
12. ~~Denote Complete typical~~ lot information per Subdivision Regulations for single family area.
13. Clarify extent of street construction and tree protection area in and near floodplain.
14. ~~Discuss proposed tree protection area for Bur Oak.~~
15. ~~Discuss location of pre-settlement cultural site.~~
16. ~~Discuss access to greenway area.~~
- 14.17. ~~Discuss Resolve~~ improvements needed to Old Schoolhouse Lane, including sidewalk.
18. ~~Discuss incorporation of spring into greenway or other protection measures, including maintenance.~~
- 15.19. ~~Discuss requested~~ Provided the Planning Commission grants a waivers to Article 6-1 of the Land Subdivision Regulations, and the height of proposed retaining walls.

With regard to the revised conditions, Mr. Martin stated that the applicant had submitted a tree protection plan and engaged an arborist to monitor the long-term health of the bur oak tree, which satisfies condition #14.

Mr. Martin said that condition #15 referred to a pre-settlement cultural site which, it was believed, could have been located on the subject property. He noted that the Commission members had received copies of an abstract of the study that was done, along with a letter of review that was provided by the University of Kentucky professor who serves as the official representative for the state of Kentucky in reviewing archeological information. According to older maps, the cultural site was located somewhere in the vicinity of the subject property, but the exact location was not known. The consultants conducted field work in the area, which was supported by the UK professor, who indicated that the state's official archeological maps would be updated accordingly. Mr. Martin stated that the consultants concluded that there were no longer any cultural remains on the site. They believed that it either existed, but in a different location, or that it existed on the subject property and had been disturbed decades ago by the previous owner of the property.

Mr. Martin said, with regard to new condition #14, that the revised plan does depict a sidewalk on Old Schoolhouse Lane, but the staff would like for the condition to remain in order to ensure that the sidewalk is constructed. Condition #18 referred to the existing spring and greenway in the area, which includes a trail system. The trail is proposed to provide access under Harrodsburg Road and connect to other overall trail systems in the area. Mr. Martin said that the staff had a

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great deal of concern about the long-term maintenance of the spring, so they suggested that the applicant modify the lotting pattern and add the spring area to the greenway. The applicant has done so, which addressed condition #18.

Waiver Presentation: Mr. Martin presented the staff report on the requested waiver to the Land Subdivision Regulations, explaining that it relates to two aspects of Twain Ridge Drive. First, the petitioner is requesting a waiver to the minimum curve radius in order to accommodate tighter curves, which are proposed to address the concerns about the original street configuration as it related to the steep slopes. Second, the petitioner is proposing to construct a portion of Twain Ridge Drive at the typical local street width, even though it will function as a collector street, in order to properly align the road and avoid the bur oak tree and its associated tree protection area. Mr. Martin noted that, when Twain Ridge Drive is connected at some point in the future, this proposed transition to a local street cross-section could help to calm traffic. He said that the staff has reviewed the waiver request with the Division of Traffic Engineering, and is recommending approval of it, as outlined in the report, for the following reasons:

1. The waiver will have no significant impact on public safety, which is consistent with the overall intent of the Land Subdivision Regulations.
2. Strict enforcement of the Land Subdivision Regulations street geometric requirements would constitute a hardship for the applicant in addressing the steep slope and preventing the effective protection of an environmentally sensitive area, and a significant and historic Bur Oak tree.

This recommendation is made subject to the following additional requirements:

- a. Denote that parking along Twain Ridge Drive be restricted to one side of the street only.
- b. Denote that the speed limit be set at 25 miles per hour on this section of Twain Ridge Drive.

Mr. Martin displayed an exhibit depicting the collector street system in the area extending from Nicholasville Road, to Clays Mill Road, to Harrodsburg Road, noting the locations where the proposed street system was interrupted as it approached Harrodsburg Road. He said that Twain Ridge Drive was envisioned to be the final link in that collector system to Harrodsburg Road, with internal connections providing various options to access the arterial roadways.

Mr. Martin displayed another aerial photograph of the area, noting the breaks in the street system, particularly at Agape Drive. He said that Agape Drive had always been planned to connect from the subject property, through the Cammack property, and to Dogwood Trace Subdivision. Mr. Martin stated that the staff would like to emphasize that they support connectivity in the area, particularly for the provision of public safety services.

Commission Question: Mr. Wilson asked who would be taking care of the bur oak tree. Mr. Martin answered that the property owner would be maintaining the tree.

Petitioner Representation: Bill Lear, attorney, was present representing the petitioner. He stated that the subject property had been rezoned to R-3, which was now final and past the date by which it could be appealed, and the types and number of units proposed are consistent with the Zoning Ordinance requirements and the recommendations of the Comprehensive Plan. The key features of the plan are essentially the same as the preliminary development plan that was approved at the rezoning hearing, with the exception of shifting the access on Old Schoolhouse Lane.

Mr. Lear stated that the petitioner contends that the requested waivers are simple and they will result in the best placement of the road as it relates to the bur oak tree and the slope of the property. The petitioner also believes that relocating the access point will create additional stacking distance for cars at the entrance of the proposed development. Mr. Lear noted that the proposed width of Twain Ridge Drive is consistent with what was proposed on the preliminary development plan, and he noted that, along the entire length of that roadway, only four residential units will have frontage. For that reason, he said, parking along the road should be very limited, and the petitioner is agreeable to the staff's recommendation to restrict parking to one side of the street only.

Mr. Lear stated that the petitioner is in agreement with all of the recommended conditions. With regard to the spring area that was previously a concern, he said that the petitioner has reconfigured the lotting pattern so that the spring will be part of the open space in the floodplain area, and pedestrian access to the greenway has been provided. This version of the plan is the result of a significant effort between the petitioner and the staff to fine-tune the plan, and take into consideration any areas of concern that were aired at the rezoning hearing.

Mr. Lear said that there were essentially two issues remaining to be addressed at the end of the rezoning hearing for the subject property. He said that there was a need to further address the pre-Columbian site that was depicted on some of the older maps of the area. The petitioner hired Cultural Resource Analysts, Inc. (CRA) to investigate the site; and they determined that either the remains were located in a different area, or they were located on the subject site, but had long since been destroyed. After additional review and some work with the University of Kentucky, the unanimous opinion is that there is no remaining site that is appropriate for preservation on the subject property.

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Mr. Lear stated, with regard to condition #13, that the petitioner originally proposed a 50' protection zone for the bur oak tree. He said that that issue was deferred by the Commission, to be addressed with the Final Development Plan. There was a great deal of discussion at the Urban County Council hearing on the rezoning of the property, but the Council took no additional action with regard to the preservation of the tree. Since that hearing, there has been some additional investigation on the tree, and the plan has been modified accordingly. The minimum tree protection area has been expanded to 70', with no new hard surface located any nearer the tree than 72', and the trail and gazebo that were proposed near the tree have been removed. Mr. Lear noted that the 70' distance will only apply on one very small portion of the circumference of the tree; the remaining portion of the tree will have a large distance of undisturbed area around it for protection.

Tom Kimmerer, Ph.D., stated that he is a forest scientist and tree physiologist with over 40 years' experience working with forest management. He said that he is the chief scientist of Venerable Trees, which is a nonprofit organization dedicated to the conservation of ancient trees in the Bluegrass Region. He noted that he is also the author of two forthcoming books about trees, one of which features the bur oak that is located on the subject property.

Dr. Kimmerer stated that he believed that the bur oak tree on the property was established sometime in the 1530s, although some reports have indicated that it is about 300 years old. He said that he had spent a good deal of time inspecting the tree, and found it to be very vigorous and well-growing. Displaying several photographs of the tree, Dr. Kimmerer noted several small holes, which were caused by round-headed borers. He explained that he believed that those holes were old, but he would watch the tree carefully in the spring to see if more beetles emerge, and will treat the tree if he finds any problems. The tree is asymmetrical, as are many of the healthy ancient trees in the Bluegrass area, some of which grow as near as 10' to active roadways. Dr. Kimmerer noted that the tree is growing partially in fill, rather than undisturbed soil, but the original soil is at least six feet deep. The tree is very deeply rooted, with no roots growing near the surface area, so the construction process will not disturb the root zone. Once the construction process begins on the subject property, the existing pavement will be very carefully removed, and the tree protection zone will be established. The protection zone will consist of a layer of paper, to kill the grass, and a layer of mulch, and it will be surrounded by a fence during the construction process.

Dr. Kimmerer said that it was his job to ensure that the tree will be well-protected, and he has no doubt that it will be. He stated that he would be inspecting the tree on a continuous basis throughout the construction process; and, afterwards, he will present the property owner with a long-term management plan for it. He noted that the tree was originally part of a large grove, of which approximately 15 were remaining prior to the construction of the Firebrook subdivision. Since that time, all but two of those trees have died, because they did not receive adequate care.

Mr. Lear stated that the petitioner has engaged Dr. Kimmerer to monitor the bur oak tree during the construction process, and periodically thereafter, to ensure that it is cared for properly. He stated that the petitioner is in agreement with all of the staff's recommendations, and he requested approval of the development plan and the waivers.

Citizen Support: There were no citizens present in support of this development plan.

Citizen Opposition: Kate Giuliani, resident of Firebrook Estates, stated that she had made a presentation at the Council hearing on the rezoning request for the subject property in October of 2013, outlining her concerns about the proposed development as it relates to the Environmental Protection Agency's Consent Decree. She said that the South Elkhorn watershed, within which the subject property is located, was the primary offender in sanitary sewer overflows, and the South Elkhorn pump station is overburdened. Ms. Giuliani presented a petition at that hearing with the signatures of 250 other Firebrook residents who were also concerned about the proposed development.

Ms. Giuliani stated that, if the proposed development will have inadequate street access, then the area will be "constricted" and too densely developed. She said that she does not understand the need for the proposed development, since there is no shortage of unoccupied apartments in the Harrodsburg Road area. Ms. Giuliani said that she believes that the petitioner is "force-fitting" the proposed development into the existing neighborhoods, and that the Planning Commission should not approve the requested waivers, which she considers as "another way of asking for apologies or forgiveness."

Kim Crocetti, 4785 Rhema Way, stated that she served as the chair of the Dogwood Trace Park committee that worked to construct the trail system to which the proposed development will connect via the South Elkhorn greenway. She said that, although she was glad to see that her initial concerns about the spring and the lack of a connection to the greenway had been resolved, she now believes that the street system could be inadequate to serve the number of units proposed. She believes that granting the requested waivers will make the street too narrow to eventually connect to Twain Ridge Drive, which is a major collector street in the area.

Ms. Crocetti stated that she was also concerned about the connection of Agape Drive, which was intended to be a collector street but is too narrow to actually serve as such. She added that she was also still concerned about the health of the bur oak tree.

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Roger Marion, 2430 Dogwood Trace Boulevard, stated that he is a geologist with extensive training and experience in karst geology. He stated that karst geology involves underground openings made by moving water and the solution of limestone. Karst geology is an ongoing, dynamic process, and Mr. Marion does not believe that studies can determine whether it will be affected at some point in the future by development above it. He noted that the sinkhole area that opened recently in the Corvette Museum in Bowling Green was likely studied prior to construction of the building, but those areas can change over time.

Mr. Marion stated that he shares the other residents' concerns about access and traffic in the proposed development.

Dr. Lauren Larson, 4796 Rhema Way, stated that she had been to many Planning Commission, subcommittee, and Council meetings where the proposed development was discussed, and she was "disheartened" by having to sit on the sidelines of those meetings and have only limited opportunities to voice her opinion. She said that a few of the residents' concerns have been addressed, but many have not; and the petitioner continues to bring forth new information, such as the requested waivers, without giving the neighbors the opportunity to learn about how they will affect the proposed development.

Dr. Larson stated that she believes that the new location proposed for the access point is inappropriate, and that it will negatively impact the bur oak tree. She said that there are three additional significant trees on the property, which are proposed to be removed, and that "150 years' worth of trees cannot be grown back."

Dr. Larson said that, as a mother, she is also concerned about the safety of children on school busses in the neighborhood, and she believes that the slopes in the proposed development are too steep to accommodate busses safely. She displayed several photographs of the existing hills in the English Station development, noting that residents are unable to navigate the streets in inclement weather. She reiterated that she is concerned about the safety of future residents of the proposed development.

Christina Dudek, 2604 Water Knoll Court, stated that she is the vice-president of the Firebrook Neighborhood Association. She said that she and many of her neighbors are concerned about increased traffic in the area and the density of the proposed development.

Ms. Dudek stated that she believes that the Planning Commission should closely review the density numbers that had been provided for the proposed development, since the petitioner intends to purchase additional property behind the Primitive Baptist Church. She believes that, if that parcel is developed, the resulting density will be greater than what is recommended by the Comprehensive Plan.

Ms. Dudek said that she is also concerned about the riparian areas around South Elkhorn Creek, as well as the future connection of Agape Drive. She noted that there are 435 houses in Firebrook, and most of the residents are opposed to the proposed development.

Jann Geddes, 4764 Rhema Way, stated that she hoped to convince the Commission members that "the use of Agape Drive as a collector street for the ingress/egress of the proposed Old Schoolhouse Lane is untenable." She said that the undeveloped, privately owned Cammack Property currently separates the subject property from the existing portion of Agape Drive; and, unless and until that property develops, Old Schoolhouse Lane would be the only means of egress from the proposed development. She read the following from the *LFUCG Roadway Manual*:

"Collector street - a street that collects traffic from local streets and feeds traffic into a larger, higher volume."

"The standard width for collector streets in Fayette County is 36 feet, with curbs and gutters."

"Widths are designated for reasonably expected uses, which tend to lead to wider streets."

Ms. Geddes stated that the width of Agape Drive is 29 feet with curbs and gutters, so she does not believe that it is wide enough to constitute a collector street. She said that it was designed for ease of use by pedestrians and cyclists, with less-daunting crossings, on-street parking, and traffic calming devices such as more frequent stops. Fayette County Public Schools busses pick up students on the street four times each day.

Ms. Geddes said that, according to Jeanne Gardner of Traffic Engineering, parking prohibitions such as the one recommended by the staff for the proposed development can only be made through a petition process. She stated that, at an earlier hearing, she presented a petition signed by 85% of her neighbors, requesting that such a parking prohibition not be allowed on the subject property.

Lenita Clark, 4728 Matthew Court, stated that she has lived in the Dogwood Trace subdivision for 23 years. She said that her greatest concern about the proposed development is the future connection of Agape Drive, which she does not

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believe is feasible. Ms. Clark stated that she also believes that the petitioner is relying too heavily on the possible connection of Twain Ridge Drive to manage traffic circulation in the proposed development, which she believes is unlikely to occur due to lack of funding.

Bob Pattie, 2500 Sungale Court, stated that his house is located near where Sungale Court dead-ends at Military Pike. He said that he resided there prior to the widening of Harrodsburg Road, and his house was damaged by blasting that was done as part of that project.

Mr. Pattie said that, as a retired Kentucky Department of Transportation traffic engineer, he does not believe that the Harrodsburg Road/Military Pike intersection was constructed correctly to accommodate the necessary turn lanes. He stated that he inspected Old Schoolhouse Lane, and found that it was constructed with insufficient base material. He believes that, if the subject property is developed, the Old Schoolhouse Lane pavement will need to be removed and replaced, rather than simply applying additional blacktop. Mr. Pattie added that he is also concerned that the amount of traffic generated by the proposed development will increase delays at the Harrodsburg Road/Military Pike intersection.

Ruth Marion, 2430 Dogwood Trace Boulevard, stated that she was also concerned about the safety of Agape Drive, which she does not believe is wide enough to serve as a through street. She said that there has already been at least one accident in which a cyclist was hit by a car that was traveling too fast, and she believes that the extra traffic will only exacerbate an existing bad situation.

Petitioner Rebuttal: Mr. Lear stated, with regard to comments about the sloped streets in the English Station subdivision, that the petitioner modified the configuration of the new street to avoid constructing it at a similar slope. He said that, by angling the street, it will have a lower slope than English Station Drive, which was originally constructed as a temporary access.

Mr. Lear said that the density of the property was considered as part of the rezoning request. He stated that the 248 units proposed at that time did take into account the property located behind Primitive Baptist Church. This revised plan depicts 238 units on the property.

Mr. Lear stated, with regard to the concerns about the karst topography of the subject property, that all of central Kentucky is on karst land. He added that the area around the subject property is almost entirely built out, so the concerns being expressed by existing residents are "concerns of their own making." Mr. Lear also said that the South Elkhorn pump station was one of the first addressed by new funding prior to the finalization of the Consent Decree.

Staff Rebuttal: The staff had no rebuttal comments.

Citizen Rebuttal: Dr. Larson stated that she was still concerned about the slope of the new roadway, despite Mr. Lear's statement that it would be less steep than English Station Drive. She said that Mr. Lear does not live in the area and doesn't see the daily traffic flow and accidents, so she does not understand how he can comment about those problems. Dr. Larson said that she would like to prevent more problems before they develop.

Commission Discussion: Ms. Plumlee thanked the citizens for their presence. She said that she was concerned about the connectivity of the proposed development, since there is only one way in and out until such time as Agape Drive is connected.

Mr. Drake asked if the staff had heard any testimony that would influence or alter their recommendation of approval, or if there were any unanswered questions. Mr. Martin responded that there were none.

Mr. Owens stated that the Planning Commission takes the concerns of citizens very seriously, and the members review the sites and experience the traffic issues as well. He said that there has been some discussion about the possible closure of Agape Drive, which can only be done through an action of the Council. Mr. Owens reiterated that this development plan does not include the southern portion of Agape Drive.

Action: A motion was made by Ms. Blanton, seconded by Ms. Mundy, and carried 7-2 (Cravens absent; Brewer and Plumlee opposed) to approve DP 2013-96, subject to the 15 revised conditions as listed, and including the two requested waivers to the Land Subdivision Regulations.

- V. **ZONING ITEMS** - The Zoning Committee met on Thursday, February 6, 2014, at 1:30 p.m. in the Division of Planning Office. The meeting was attended by Commission members Carla Blanton, David Drake, and Bill Wilson. The Committee reviewed applications, and made recommendations on zoning items as noted.

A. **ABBREVIATED PUBLIC HEARINGS ON ZONING MAP AMENDMENTS**

The staff will call for objectors to determine which petitions are eligible for abbreviated hearings.

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The procedure for these hearings is as follows:

- Staff Reports (30 minute maximum)
- Petitioner's report(s) (30 minute maximum)
- Citizen Comments
 - (a) proponents (10 minute maximum OR 3 minutes each)
 - (b) objectors (30 minute maximum) (3 minutes each)
- Rebuttal & Closing Statements
 - (a) petitioner's comments (5 minute maximum)
 - (b) citizen objectors (5 minute maximum)
 - (c) staff comments (5 minute maximum)
 - (d) Hearing closed and Commission votes on zone change petition and related plan(s)

B. FULL PUBLIC HEARINGS ON ZONE MAP AMENDMENTS – Following abbreviated hearings, the remaining petitions will be considered.

The procedure for these hearings is as follows:

- Staff Reports (30 minute maximum)
- Petitioner's report(s) (30 minute maximum)
- Citizen Comments
 - (a) proponents (10 minute maximum OR 3 minutes each)
 - (b) objectors (30 minute maximum) (3 minutes each)
- Rebuttal & Closing Statements
 - (a) petitioner's comments (5 minute maximum)
 - (b) citizen objectors (5 minute maximum)
 - (c) staff comments (5 minute maximum)
- Hearing closed and Commission votes on zone change petition and related plan(s)

Note: Requests for additional time, stating the basis for the request, must be submitted to the staff no later than two days prior to the hearing. The Chair will announce its decision at the outset of the hearing.

1. HAYMAKER DEVELOPMENT CO., LLC, & COVENTRY (BELMONT FARM) (AMD.) ZONING DEVELOPMENT PLAN

- a. MAR 2014-3: HAYMAKER DEVELOPMENT CO., LLC (4/7/14)* - petition for a zone map amendment from a Planned Neighborhood Residential (R-3) zone to a Light Industrial (I-1) zone, for 81.22 net and gross acres; from a High Density Apartment (R-4) zone to a Light Industrial (I-1) zone, for 3.77 net and gross acres; from a Planned Neighborhood Residential (R-3) zone to a Professional Office (P-1) zone, for 4.49 net and gross acres; and from a High Density Apartment (R-4) zone to a Professional Office (P-1) zone, for 9.32 net and gross acres, for property located at 2250 Spurr Road and 2350, 2400, & 2550 Georgetown Road (a portion of each).

COMPREHENSIVE PLAN AND PROPOSED USE

The 2013 Comprehensive Plan's mission statement is to "provide flexible planning guidance to ensure that development of our community's resources and infrastructure preserves our quality of life, and fosters regional planning and economic development." The mission statement notes that this will be accomplished while protecting the environment, promoting successful, accessible neighborhoods, and preserving the unique Bluegrass landscape that has made Lexington-Fayette County the Horse Capital of the World. Theme C: "Creating Jobs and Prosperity," identifies the need to protect and provide readily available economic development land to meet the need for jobs. The petitioner proposes professional office (about 14 acres) and industrial land use (about 85 acres) for the 99-acre subject property in hopes of attracting new business to the region.

The Zoning Committee Recommended: **Approval**, for the reasons provided by staff.

The Staff Recommends: **Approval**, for the following reasons:

1. The existing Planned Neighborhood Residential (R-3) and High Density Apartment (R-4) zones are inappropriate, and the proposed Professional Office (P-1) and Light Industrial (I-1) zones are appropriate for the following reasons:
 - a. Land that is currently zoned P-1 is being utilized by Fayette County Public Schools for a new elementary School along Spurr Road. Thus, the proposed 14 acres of P-1 zoning will offset that loss of "jobs land" within the immediate vicinity.
 - b. The proposed P-1 zoning is located adjacent to a multi-family residential land use, which will create a logical step-down in intensity of land use to the proposed industrial use further to the north.
 - c. The proposed I-1 zoning and land are compatible and complementary to the Coldstream Research Campus to the east.

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- d. The existing greenway to the west provides a physical boundary that can be utilized as a logical land use boundary as well. This land use boundary will separate residential development to the west of the location, and provide employment generating land to the east of the greenway.
 - e. A less than favorable market in this portion of the community exists for multi-family residential, evidenced by another multi-family condominium development in the immediate vicinity that has been sold/occupied at a slow rate over the past decade.
 2. The 2013 Comprehensive Plan, Theme C "Creating Jobs and Prosperity" identifies the need to protect and provide readily available economic development land to meet the need for jobs. The petitioner proposes professional office (about 14 acres) and industrial land use (about 85 acres) for the 99-acre subject property in hopes of attracting new business to the region. The P-1 and I-1 zones are able to fulfill the goal of increasing opportunities for employment locations within the urban county.
 3. This recommendation is made subject to approval and certification of ZDP 2014-7: Coventry (Belmont Farm) (Amd.) prior to forwarding a recommendation to the Urban County Council. This certification must be accomplished within two weeks of the Planning Commission's approval.
 4. Under the provisions of Article 6-7 of the Zoning Ordinance, the following uses are recommended to be prohibited on all portions of the subject property:
 - a. Underground storage tanks for materials other than petroleum products.
 - b. Mining of non-metallic minerals.
 - c. Establishments or facilities for hazardous waste transporters.
 - d. Any type of facility for hazardous waste storage, treatment and/or disposal.These use prohibitions are appropriate and necessary since all of the subject property is located within the Royal Spring Aquifer Recharge Area, defined in the Land Subdivision Regulations as an environmentally sensitive area, and since these restrictions are currently in place on the subject property and should continue.
- b. ZDP 2014-7: COVENTRY (BELMONT FARM) (AMD) (4/7/14)* - located at 2250 Spurr Road and 2350, 2400, 2450 and 2550 Georgetown Road.
(EA Partners)

The Subdivision Committee Recommended: Approval, subject to the following conditions:

1. Provided the Urban County Council rezones the property I-1 & P-1; otherwise, any Commission action of approval is null and void.
2. Urban County Engineer's acceptance of drainage, storm and sanitary sewers, and floodplain information.
3. Urban County Traffic Engineer's approval of parking, circulation, access, and street cross-sections.
4. Building Inspection's approval of landscaping and landscape buffers.
5. Urban Forester's approval of tree inventory map.
6. Greenspace Planner's approval of the treatment of greenways and greenspace.
7. Department of Environmental Quality's approval of environmentally sensitive areas.
8. Denote: No building permits shall be issued unless and until a final development plan is approved by the Planning Commission.
9. Addition of all required necessary information per Article 21 of the Zoning Ordinance.
10. Addition of cross-section for Remington Way extension.
11. Provided the Planning Commission grants a waiver to Article 6-8(f) of the Land Subdivision Regulations.
12. Resolve the need for pedestrian connection from this development to Spurr Road.
13. Resolve the landscape buffer for residential uses from industrial street (Remington Way ext.)

Zoning Presentation: Ms. Wade began the staff's presentation of the zoning report by noting that the staff had received one letter in support of this request, from Commerce Lexington. She said that the petitioner is requesting a zone change that is divided into four parts, and the subject property is a portion of the former Belmont Farm. A piece of that property has been developed for single family residential use as the Coventry subdivision, along Spurr Road, which ends as a stub. A portion of the property along Remington Way, which is also a stub street, was developed for multi-family residential use. Ms. Wade stated that another portion of the subject property was developed as a small park for the Coventry subdivision. A parcel was also recently sold to Fayette County Public Schools as the site of a future elementary school, to be located at the intersection of Georgetown Road and Spurr Road at the entrance to the Coventry subdivision. Also in the vicinity of the subject property is vacant land at the intersection of Georgetown Road and Citation Boulevard, which is proposed for commercial development in a B-6P zone; the Belmont Farm single family residential neighborhood to the south; the Coldstream Research Park, to the east; and the University of Kentucky dairy farm, to the north.

Ms. Wade stated that the subject property has previously been the subject of two zone changes. In 1992, it was rezoned to R-3, P-1, and P-2, to implement a part of the Coldstream Small Area Plan. In 2001, the property was rezoned to its existing configuration, with a mixture of residential, professional office, and retail zoning. The proposed mixed-use development has yet to be completed. The petitioner is currently proposing Professional Office parcels to border the existing multi-family residential uses along Remington Way, with Light Industrial uses proposed further to the north. Ms. Wade displayed two photographs of the subject property, noting that it is currently vacant.

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Ms. Wade said that the 2013 Comprehensive Plan no longer focuses on specific map-based land uses, but utilizes a policy-based approach, which provides more flexibility for the Planning Commission and the applicants in rezoning requests. She stated that previous Comprehensive Plans recommended several different land uses for the subject property, which was reflective of the multiple zone changes, but also of the appropriateness of the area for an array of possible uses. The 2013 Comprehensive Plan suggests that more land should be developed that will permit employment opportunities within Lexington-Fayette County. The Comprehensive Plan identifies that 500 acres of land that was recommended for job creation have been depleted since the 1990s. Ms. Wade said that the proposed zone change will restore nearly 100 acres of that lost acreage, with the goal of providing "shovel-ready" land to be marketed by local economic development professionals, including Commerce Lexington. She stated that the staff also believes that the existing zoning is inappropriate at this location, and the proposed zoning is appropriate.

Ms. Wade stated that the staff and the Zoning Committee recommend approval of this request, for the reasons listed in the staff report and on the agenda. She said that the staff is recommending conditional zoning restrictions for the subject property. There are existing restrictions on the property, and the staff believes that they should be maintained, primarily in order to protect the Royal Spring Aquifer Recharge Area, which provides drinking water for the city of Georgetown.

Development Plan Presentation: Mr. Martin presented the corollary zoning development plan, which was filed as a preliminary development plan and subdivision plan. He further oriented the Commission to the location of the subject property, noting that it is located near the proposed school site, for which the Commission recently reviewed a plat.

Mr. Martin stated that the petitioner is proposing to extend Remington Way to serve the industrial lots as depicted on the plan, with open space and greenway areas. He said that the staff is recommending approval of this plan, subject to the conditions as listed on the agenda. With regard to condition #12, he explained that the staff is concerned with the proposed termination of Spurr Road, which is now configured to prevent industrial traffic from cutting through the existing residential neighborhood to the west. The staff believed that it was important to still maintain a pedestrian connection at that location, to provide access for any residents of the neighborhood who might work on the subject property. Mr. Martin stated that that condition had been satisfied with the submission of the revised plan. He said, with regard to condition #13, that the petitioner intends to place the landscape buffer closer to the residential neighborhood, which will allow it to be more visually effective.

With regard to condition #11, Mr. Martin stated that the Commission is being asked to approve a waiver to the required length of the cul-de-sac. He said that the Subdivision Regulations require that a cul-de-sac should not be more than 1,000 feet in length, due to concerns about fire safety. The cul-de-sac proposed on this plan is well over 2,000 feet in length; however, only a few, very large lots are proposed. In addition, the petitioner has agreed to restrict the development of the subject property so that Final Development Plans are required for each lot. That will provide the Commission with the opportunity to review each parcel on a Final Development Plan, and to evaluate and ensure that public safety and environmental issues have been addressed adequately. Mr. Martin stated that the staff is recommending approval of the requested waiver.

Mr. Martin said that, after meeting with the petitioner, the staff recommended that they "blend" this plan, which was originally filed as a preliminary development plan, instead making it a preliminary subdivision plan as well. That grants the petitioner the desired flexibility in the industrial area, so they can determine how much acreage is needed for each potential project. Because of that change to the status of the plan, the following two conditions should be added to the conditions for approval:

14. Add the words "Preliminary Development Plan" back into the plan title.

15. Addition of Owner's and Planning Commission's Certifications to plan.

Mr. Martin said that, with the addition of those conditions, the staff and the Subdivision Committee are recommending approval of this plan.

Traffic Impact Study Presentation: Mr. Sallee presented the staff review memo on the petitioner's Traffic Impact Study. He said that full development on the subject property is expected in 2019. The petitioner is proposing to construct only one access to the proposed development, at the intersection of Citation Boulevard and Remington Way. Following full build-out of the development, the TIS predicts approximately 883 new trips in the morning peak hour, with 649 new evening peak-hour trips estimated.

Mr. Sallee stated that there were three critical intersections reviewed as part of the TIS: Georgetown Road and Citation Boulevard; Remington Way and Citation Boulevard; and McGrathiana Parkway and Citation Boulevard. All of those intersections currently operate at level of service "C," and all are anticipated to have the same level of service at full build-out of the proposed development in 2019. Mr. Sallee noted that an additional four seconds of delay is anticipated at the Citation Boulevard/Remington Way intersection at full build-out. He said that the staff's conclusions were that the TIS met the requirements of the Zoning Ordinance.

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Petitioner Representation: Glenn Hoskins, attorney, was present representing the petitioner. He stated that the petitioner is in agreement with all the staff's recommendations, and he requested approval of the rezoning and the requested waiver.

Zoning Action: A motion was made by Mr. Brewer, seconded by Mr. Drake, and carried 9-0 (Cravens absent) to approve MAR 2014-3, including the recommended conditional zoning restrictions.

Development Plan Action: A motion was made by Mr. Brewer, seconded by Mr. Drake, and carried 9-0 (Cravens absent) to approve ZDP 2014-7, subject to the 15 conditions as listed, including the requested waiver to the Land Subdivision Regulations.

Note: Chairman Owens declared a brief recess at 2:53 p.m. The meeting reconvened at 3:01 p.m.

2. **BOONE CREEK PROPERTIES, LLC, DBA BOONE CREEK OUTDOORS ZONING MAP AMENDMENT & BOONE CREEK OUTDOORS ZONING DEVELOPMENT PLAN**

- a. MARC 2014-1: BOONE CREEK PROPERTIES, LLC, DBA BOONE CREEK OUTDOORS (2/27/14)* - petition for a zone map amendment from an Agricultural Rural (A-R) zone to an Agricultural Natural (A-N) zone, for 20.15 net (20.76 gross) acres, for property located at 8291 Old Richmond Road. A conditional use permit is also requested with this zone change.

COMPREHENSIVE PLAN AND PROPOSED USE

The subject property is located within the Rural Service Area, which encompasses 200 square miles and about 70% of Lexington-Fayette County. The 1999 Rural Land Management Plan was developed to guide resource management and planning for this portion of the County, and the Plan recommends the subject property be utilized for Natural Area (NAT) land use. The 2013 Comprehensive Plan recommends updating, affirming and readopting the Rural Land Management Plan. The 2013 Comprehensive Plan's mission statement is to "provide flexible planning guidance to ensure that development of our community's resources and infrastructure preserves our quality of life, and fosters regional planning and economic development." The mission statement notes that this will be accomplished while protecting the environment, promoting successful, accessible neighborhoods, and preserving the unique Bluegrass landscape that has made Lexington-Fayette County the Horse Capital of the World.

The petitioner proposes to rezone the property to an Agricultural Natural (A-N) zone, and is requesting a conditional use to operate a commercial outdoor recreational facility that includes a tree canopy tour (ecotourism), welcome center, seasonal educational programs, and training for guides and builders of other zip line facilities. The petitioner also plans to maintain the existing conditional use permit for an outdoor recreational facility – the Boone Creek Angler's Club – which was approved as a private club by the Board of Adjustment in 2000.

The Zoning Committee Recommended: **Approval**, for the reasons provided by staff.

The Staff Recommends: **Approval** for the following reasons:

1. The requested Agricultural Natural (A-N) zoning for the subject property is in agreement with the Rural Land Management Plan's recommendations for Natural Areas (NAT) land use at this location.
 2. The 2013 Goals and Objectives also encourage the development of appropriate attractions and supporting uses that promote and enhance tourism (Theme C, Goal 1, Objective e), support the agricultural economy, horse farms, general agricultural farms, and the rural character of the Rural Service Area (Theme E, Goal 2), and protect the environment (Theme B).
 3. This recommendation is made subject to approval and certification of ZDP 2014-3: Boone Creek Outdoors prior to forwarding a recommendation to the Urban County Council. This certification must be accomplished within two weeks of the Planning Commission's approval.
- b. REQUESTED CONDITIONAL USE
Commercial outdoor recreational facility

CASE REVIEW

Boone Creek Properties, LLC is requesting a conditional use permit for a commercial outdoor recreational facility in conjunction with a zone change request from an Agricultural Rural (A-R) zone to an Agricultural Natural (A-N) zone for 20.15 acres at 8291 Old Richmond Road. The property is situated along Old Richmond Road and Boone Creek (which forms the boundary with Clark County), just northeast of the Interstate 75 interchange at Exit 99 in southern Fayette County.

The Zoning Committee Recommended: **Postponement**, for the reasons provided by staff.

The Staff Recommends: **Postponement**, for the following reasons:

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1. There is a pending Zoning Ordinance Text Amendment designed to provide greater clarity in the regulation of zipline tours and other outdoor recreational activities. The staff strongly prefers that the current application for a Conditional Use Permit postpone until the ZOTA has been fully considered by the Commission, and ultimately, by the Council.
 2. There are a number of unresolved legal issues associated with the current request for Planning Commission consideration of a Conditional Use Permit for an outdoor recreational use at this location. The staff would like to continue to discuss these issues with the Department of Law prior to the Planning Commission's consideration of this application.
 3. Important details are missing about aspects of the proposed conditional use. The staff believes that clarification of those activities should be discussed in conjunction with any consideration of additional conditional uses on the subject property.
- c. ZDP 2014-3: BOONE CREEK OUTDOORS (2/23/14)* - located at 8291 Old Richmond Road.
(Barrett Partners)

The Subdivision Committee Recommended: Postponement.

Should this plan be approved, the following requirements should be considered:

1. Provided the Urban County Council rezones the property A-N; otherwise, any Commission action of approval is null and void.
2. Urban County Engineer's acceptance of drainage, storm and sanitary sewers, and floodplain information.
3. Urban County Traffic Engineer's approval of parking, circulation, access, and street cross-sections.
4. Building Inspection's approval of landscaping and landscape buffers.
5. Urban Forester's approval of tree inventory map.
6. Greenspace Planner's approval of the treatment of greenways and greenspace.
7. Department of Environmental Quality's approval of environmentally sensitive areas.
8. Discuss proposed development in front of 300' building line and need for variances.
9. Discuss proposed caretaker's apartment (per Art. 8-3(c)(8) of the Zoning Ordinance).
10. Addition of proposed square footage for observation deck(s) and welcome center deck to site statistics.
11. Clarify employee parking information.
12. Denote that the parking lot shall be screened and paved in accordance with the requirements of the Zoning Ordinance.
13. Denote that the proposed access and any required road improvements shall be determined at the time of the final development plan.
14. Revise flex note to clarify that it applies to the canopy tour only.
15. Discuss the Board of Adjustment's approved 2000 Conditional Use development plan relative to the proposed plan.

Chairman Comments: Mr. Owens stated that this proposed rezoning was well-known and controversial. For that reason, he said, he met with all of the involved legal counsel prior to the hearing to set out guidelines about how they would be expected to conduct themselves, and to remind them of the time limits established by this body for zoning public hearings. Mr. Owens noted that he had received communications from both parties in this case via his personal email address and mailing address, and he did not believe that was appropriate. He said that he appreciated having the opportunity to receive pertinent information; but, for procedural purposes, in the future that information should be sent through the Planning staff.

Opposition Request: Don Todd, attorney, was present representing the Old Richmond Road and Boone Creek Neighborhood Associations. He said that he had submitted a letter to Chairman Owens concerning a potential conflict of interest for Planning Commission member David Drake. The letter indicated that Mr. Drake had served with the petitioner, Burgess Carey, on a corporate board, and it asked Mr. Drake to recuse himself from this hearing.

Mr. Drake stated that it was obvious that the proposed rezoning is a contentious issue. He said that, for those with decision-making responsibilities, "the easy thing to do would be to duck." He does not believe, however, that one should accept such a responsibility if one's tendency is to avoid such issues.

Mr. Drake stated that his commitment to serve on the Planning Commission must be balanced with issues of integrity and possible conflicts of interest. He said that, in this instance, he has known Mr. Carey for about three years; they met when Mr. Drake joined the board of directors of a company, on which Mr. Carey also serves. Mr. Drake explained that he and Mr. Carey are not social friends; but he does know him, as he has known other individuals who have appeared before the Commission. Recognizing that this relationship is different, however, Mr. Drake sought counsel on the issue. He was advised, by two different attorneys who practice in the public sector, that the essence of conflict of interest is financial or material gain or loss. He said that he has no interest whatsoever in the venture that is before the Planning Commission today, and the outcome will not affect the performance of the entity for which he and Mr. Carey serve as directors. Therefore, Mr. Drake stated, he finds no basis for conflict of interest in this case. He opined that his obligation is to fulfill the commitment he made when he joined the Planning Commission; but, if something arises that indicates that he

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should change that opinion, he would do so. He added that, after all the evidence is heard, and his vote is cast, he would be happy to explain the reasons behind his voting decision.

Chairman Comments: Mr. Owens stated that several questions have been raised in different venues about whether the Planning Commission should be hearing the conditional use request that was filed with this zone change. He said that, at this point, the Commission's legal counsel would provide an opinion on that issue.

Legal Comments: Ms. Jones stated that she had distributed and entered into the record of this hearing a letter, dated with today's date and addressed to Chairman Owens, indicating that her official legal opinion is that the Commission can hear the conditional use request at this hearing.

Ms. Jones stated that this hearing is for a rezoning request from the A-R zone to the A-N zone, for property located at 8291 Old Richmond Road. Attendant to that request, which is provided for in KRS.100, the Kentucky state statute that governs planning and zoning, is a conditional use permit application. Ms. Jones said that the Planning Commission does not typically hear conditional use permit requests, which is normally a Board of Adjustment function; but the statute provides that, on occasions when rezoning and conditional use requests go together, they can be heard by the Planning Commission at the same time.

Ms. Jones stated that several lengthy discussions have taken place with regard to whether or not the Commission should hear the conditional use permit request at this hearing. To provide some background for the basis on which Mr. Todd filed his motion, she said that there is an existing conditional use permit in effect on the property at 8291 Old Richmond Road for a private fishing club. That conditional use request was heard by the Board of Adjustment (BOA) and the permit issued in 2000, and it is the only conditional use permit that currently exists on the property. In 2011, a conditional use application was filed with the Board of Adjustment that asked for an additional conditional use for the subject property, as well as two other adjacent addresses, totaling approximately 160 acres. That conditional use application requested uses such as platforms for primitive camping; hiking; fish hatcheries; canoeing; ziplines; mountain biking trails; and other commercial recreational activities. The Board of Adjustment, over a two-day hearing, heard the application and denied the request for a conditional use in 2012. Following that hearing, as a legal right of any applicant who is denied a conditional use application, the Board's decision was appealed to Fayette Circuit Court. That case is currently before the Third Division; it has not been ruled upon or briefed. Ms. Jones explained that, when the case is ruled upon or briefed, the judge will be deciding whether or not the decision made by the BOA was based on adequate facts so that their decision was not arbitrary. (She noted that, like the Planning Commission, the BOA makes decisions based on findings of fact and the testimony recorded at the hearing.)

Ms. Jones said that, in 2013, the duty of zoning enforcement was transferred to the Division of Planning. The Division received complaints about things that were being done on the subject property that were in violation of the 2000 conditional use permit. Specifically, those complaints involved the construction and operation of ziplines on the property. The Zoning Enforcement staff visited the site on more than one occasion, worked with the staff of other LFUCG divisions on several issues, and determined that the construction and operation of the ziplines, as well as the advertising of activities to go along with them, was in violation of the 2000 conditional use permit, which they determined did not provide for those activities. Once that determination was made, a letter was issued to the property owner, outlining the complaints received, noting that they had been confirmed by on-site investigations, and providing an opportunity for the owner to respond. The property owner did respond, explaining that they did not agree with the Division of Planning's interpretation of what was allowed under the 2000 conditional use permit. The property owner believed that the "recreational activities" included on that permit covered the activities in question, and indicated that they did not intend to stop those activities. Ms. Jones stated that there was a great deal of discussion at the time between the Department of Law and the Division of Planning about how to proceed, but eventually it was decided that Mr. King should issue a Notice of Violation (NOV) to the property owner. That NOV was based on the fact that there was no conditional use permit on the property that would allow the construction or operation of the ziplines, and the activities that went along with them. At that point, the property owner filed an appeal of the NOV to the Board of Adjustment, which is permitted by the Zoning Ordinance. The BOA heard that appeal, and determined to uphold the NOV. That decision by the BOA was also appealed to Fayette Circuit Court, on the basis that the interpretation that was made, and with which the BOA agreed, was incorrect. The same judge, in the same division, was randomly assigned that appeal as well, and it has not been briefed. Ms. Jones said that there was some concern expressed by the Zoning Enforcement staff, the BOA, and the neighbors of the subject property that the zipline activity was ongoing while the appeal was being considered. Following a lengthy discussion amongst the staff, they went to the BOA and discussed with them in an open meeting all of their alternatives to stop the action that had been determined to be in violation of the existing permit. Those options were to: revoke the permit; attempt to enforce it criminally; wait and see how the appeal progressed; or go to court and seek an injunction. The BOA chose to seek an injunction, and the Law Department filed a motion for a temporary injunction to stop the zipline activity on the property. A hearing was held, and the Court issued a temporary injunction, based on the fact that there was no conditional use permit in effect that authorized that activity, and the Division of Planning should be able to enforce the Zoning Ordinance until either the right permit was issued or the property owner was in compliance with the statutes. That temporary injunction is currently still in place.

Ms. Jones stated that the property owner appealed that injunction to the Court of Appeals, which issued an opinion up-

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holding the injunction. Therefore, there is no matter pending at the Court of Appeals at this time. Currently, two appeals are pending in the Court: the appeal of the denial of the conditional use that was requested in 2011; and the appeal of the NOV that was upheld in 2013. Ms. Jones explained that the property owner filed this rezoning request at the end of 2013, along with the attendant conditional use permit request. That conditional use permit application is for tree canopy tours, a guide training facility, the use of an existing structure as a welcome center, and other related activities.

Ms. Jones said that the question that is being raised is whether the Planning Commission can hear the conditional use application today, given the pending appeals from the BOA. She reiterated that her legal opinion is that the Commission can hear this request, despite the arguments to the contrary. One such argument is that the Planning Commission no longer has jurisdiction to hear it, since matters have been taken on appeal to the Circuit Court. Ms. Jones stated that that might be true, if the conditional use permit requests were the same, but they are not. She said that they are very similar, but this request is for 21 acres, rather than the 160 acres from the 2011 conditional use permit request. That request also involved more than one property, with a greater scope of activities and commercial uses, while this request is for the subject property only, and the list of uses has been pared down. Included in Ms. Jones's materials submitted to the Planning Commission was a portion of an Attorney General opinion discussing the meaning of "identical" in cases such as these. That opinion states that it means to be "equal, interchangeable, or identical."

Ms. Jones stated that, when this case first came up, the attorneys involved discussed the possibility that it might be a case of *res judicata*, which means that it has already been decided. She said that she does not believe that it matters what it is called legally, either *res judicata* or "divestiture of jurisdiction," the practical implication is that the facts and the circumstances have to be the same in order for either of those terms to apply. In addition, she included in her memo to the Commission citations from cases that were very similar to this one, wherein the matters were heard.

Ms. Jones stated that her memo also included excerpts from KRS 100.203, which outlines the mechanism by which a zone change and a conditional use permit can be filed for simultaneous consideration by a Planning Commission. She said that, the way she reads the statute, an urban county government is allowed to make a decision to hear conditional use requests and zone changes together. Since LFUCG has included in the Zoning Ordinance a provision allowing those two types of requests to be made together, Ms. Jones believes that "the decision has been made, as a government, to do that." She noted that the part that has been left out of some of the legal discussions is that, when a government decides to allow those two types of applications to be made together, KRS defines a list of things that shall be done. One of those requirements is that a provision must be made in the regulations to allow an applicant to elect to file those two types of applications together.

Ms. Jones stated that it was her opinion that the Planning Commission needs to hear the conditional use permit request. She said that she believes that there are enough different factors from the other pending cases that, while there might be some technical issues that will need to be addressed, the Planning Commission is not precluded from hearing it and has not lost jurisdiction.

Chairman Comment: Mr. Owens stated that the attorneys for both sides would be allowed three minutes each to make their comments about this issue. He noted that, if the Planning Commission members had any questions, they should be addressed to Ms. Jones.

Opposition Representation: Mr. Todd stated that it would be virtually impossible to address a lengthy legal argument in three minutes. He said that he sent a memorandum to the Planning Commission on February 18th that outlined all of the issues to which Ms. Jones referred.

Mr. Todd stated that the Planning Commission should not hear this case today, for two reasons. He said that, first; there are no ordinances in place dealing with the natural area. A task force has been working on drafting a Zoning Ordinance text amendment to address recreation issues, but the Planning Commission is being asked to pass a zone change and conditional use permit "for which no legislation exists about how to control, supervise, and articulate that particular process." Mr. Todd emphasized that never in the history of the merged government has a zone change with an associated conditional use permit been allowed to pass when there was pending litigation in court and a Zoning Ordinance text amendment being developed to address the issues involved.

Mr. Todd said, in response to Ms. Jones's arguments, that there are currently two cases before the court that deal with the same piece of property and the same improvements. He opined that this case involves a divestiture of jurisdiction because the claimant (Mr. Carey) filed an appeal to the court, and asked the court to hear it. At that point, Mr. Todd believes, the Planning Commission, as an administrative body that listens to judicial issues, renders findings of fact, and makes decisions, has allowed their jurisdiction to go to the court. Once the case moves to the court, the Planning Commission can no longer rule on it, unless and until the court remands it to the Commission, or issues an opinion. Mr. Todd added that he does not believe that this case can be considered as *res judicata*, since the court has not yet decided the case.

Mr. Todd stated that, in her memo to the Commission, Ms. Jones referred to a case from Jessamine County. He said

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that he does not believe that that case involved divestiture of jurisdiction, because there were no appeals filed to the court.

Petitioner Representation: Richard Murphy, attorney, was present representing the petitioner. He contended that this request is a different case than what was previously brought to the BOA; it includes 20 acres on one piece of property, as opposed to 200 acres on three different properties. The previous application included cabins, a canoe livery, mountain biking trail, and three footbridges into Clark County, none of which are included in this application.

Mr. Murphy stated that the BOA heard an application approximately a year ago, while the recreation ZOTA task force work was pending, for a hayride/pumpkin patch in the rural area, which was approved. He said that that ZOTA has been pending for at least two years already; and the petitioner does not have confidence that it will be acted upon anytime soon, since it was referred to the Commission by the Urban County Council to allow them additional time to work on it, as opposed to the Council initiating it and incurring a time limit. The petitioner would like to open the facility this season, and does not believe that they should be required to wait for the ZOTA to be acted upon.

Mr. Murphy said that, in the Jefferson County case of *Conley vs. Anchorage*, a ZOTA was pending when a subdivision plat was brought before the Planning Commission, and the plat was approved. The City of Anchorage did not believe that the plat should have been approved, since a ZOTA was pending, but the Kentucky Supreme Court of Appeals ruled that the property owner has the right to be heard under the law that was in effect when the hearing took place. In the more recent *Hume vs. Bizzack* case, a zone change was disapproved by the courts. While the appeal was still pending, the exact same zone change was refiled; and the Kentucky Supreme Court ruled that the zone change must be heard, because the doctrine of *res judicata* does not apply in zoning decisions. Mr. Murphy said that additional case law cites that that same principle applies to conditional uses as well. He stated that he does not believe that there is any legal or practical reason for the Planning Commission not to hear this case today.

Commission Questions: Mr. Drake stated that the Planning Commission was caught between divergent legal opinions. He asked Ms. Jones if she heard anything in the statements made by Mr. Todd and Mr. Murphy that would modify her earlier opinion. Ms. Jones answered that she had not heard anything that would change her opinion. She added that the attorneys have been discussing this issue for some time, so she was aware of the issues that Mr. Todd and Mr. Murphy intended to raise at this hearing.

Mr. Penn said that it appeared that the Commission would need to decide whether or not it would be to their advantage to hear the conditional use request. He stated that the heart of this issue is the planning process, and the fact that it needs to be followed. Mr. Penn said that, since parts of the case are still pending in court, he is not certain that the Planning Commission should get into the discussion on the conditional use at this time. He stated that Ms. Jones had not indicated that the Commission had to hear it, and the Commission heard testimony from the opposition that it should not be heard. He asked the other Commission members if hearing the conditional use request would help them advance the planning process. He added that, "the only way to get out of a hole is to quit digging. This applicant has dug a hole, and now he is wanting us to get him out." Mr. Penn stated that he spent 22 meetings working on the recreation ZOTA to address issues such as these, as did the petitioner, and yet the petitioner continued to go forward with his project. He asked his fellow Commission members to consider what impact it would have on the planning process to help the petitioner get out of the situation he created for himself.

Ms. Jones stated, with regard to Mr. Penn's comments, that her memo did indicate that she believes that the Planning Commission has to hear the conditional use request. She said that, in her evaluation, there are different issues in the court on appeal than what the Commission has before them today. She believes the process outlined in KRS 100.203, section 6 (a) and (b) has been followed in this case, and it is incumbent upon the Commission to hear the conditional use request. Ms. Jones stated that she was present at many of the recreation ZOTA meetings as well, and she could appreciate Mr. Penn's concerns; however, the *Conley vs. City of Anchorage* case to which Mr. Murphy referred ruled that a planning commission could not defer hearing a case because of some ordinance or statute that might be enacted. She said that she is aware that everyone is very concerned about the proposed ZOTA; but it is not on the books at this time, and the case law in this instance is very clear. Ms. Jones opined that the Commission could not use the pending ZOTA as a basis to defer hearing the conditional use request, or as a finding to deny it. She added that the ZOTA is a separate issue that, due to unfortunate timing, is moving on its own path, which does not coincide with the filing of this request. Ms. Jones said that she understands Mr. Penn's frustrations about this entire situation having become a "hole," but she believes that, "the hole has been dug by all of the people involved." She said that she could not tell someone that they could not pursue their legal option, or tell someone else that they cannot have an opportunity to argue with that legal option; her job is to help the Commission find the best way to stay on task within the established process. Ms. Jones reiterated that she does believe that the Commission has to hear the conditional use request.

Mr. Penn said that the zone change and conditional use request would then be heard at the same time. He asked, if the rezoning request and conditional use request are disapproved, how long it would be before the petitioner could file another request. Ms. Jones answered that the zone change and conditional use request would be heard together, but the conditional use request would not go forward if the zone change is not approved. Mr. King stated that the Planning Commission's by-laws state that, if the zone change is denied, there is a one-year time limit before it can be refiled. He

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noted that the by-laws do not address the conditional use portion of the application, which is a separate action, even though the Commission would be hearing it along with the zone change. Mr. King added that the statute says that the Planning Commission can only assume the action of approving a conditional use request in conjunction with a zone change. He said that, if the Planning Commission does not approve the zone change, he assumed that the petitioner's recourse would be to file a conditional use permit to the BOA, if that is determined to be their right under the law. Mr. Penn stated that his reason for asking that question is to ensure that everyone knows what the stakes are in this case.

Ms. Plumlee stated that, when she considers a zone change or development plan, she prefers to consider it on its merit. She said that, "with all the baggage that this case is bringing, it is not a merit scholar." She believes that the Commission could possibly approve something that is already built out on the subject property, which could send the message to the development community that they can just build whatever they want and then request permission after the project is completed. Ms. Plumlee stated that that is not the message that she wants the Planning Commission to send.

Ms. Blanton stated that she is a strong believer in process, and she shares her fellow Commission members' frustrations that the process was not followed in this case. She said, however, that no legal reason has been presented that would justify the Commission to take the petitioner's previous bad acts into consideration when they should be voting on the issues that are before them. Ms. Blanton stated that she had to put aside any preconceived opinions about whether or not the Commission would be rewarding the petitioner for not following the process, because that is not the case that is before the Commission at this time. She said that the pending court cases address the question of whether or not the petitioner should be penalized for not following the established procedure, and a penalty will be applied if the court determines that it is necessary; so she does not believe that the Planning Commission would be setting a precedent by hearing the conditional use request. Ms. Blanton added that the Commission cannot hold up this request because of the pending recreation ZOTA, which could also set a precedent, and for which no legal justification has been presented. She said that, based on the information discussed at the Commission's last work session, there are many divergent opinions on that ZOTA, and she does not believe that it will go forward quickly. She added that the Commission should follow Ms. Jones's advice, move forward with this hearing, consider the case on its merits, and try to set aside the frustrations about what has happened previously on the subject property.

Mr. Owens stated that he did not want to go into the merits of the application at this point; this discussion was about whether or not the Commission should hear the conditional use request. He said that he has heard a number of varying legal opinions, and has spoken to Ms. Jones almost daily for the past week. Mr. Owens stated that one issue that he had not heard brought up at this hearing was the text of the Zoning Ordinance Article 6-4(c), which states that the Planning Commission "may hear and act upon a requested conditional use." He opined that the text of KRS is vague, and that the Planning Commission needed to move on and decide whether or not to hear this request.

Mr. Wilson asked if the Ordinance's reference to "may hear" assumes that the issue will be acted upon as well, or just heard. Ms. Jones answered that she has not researched that question; but she believed that, if the Commission hears the request today, they will have to take some kind of action. With regard to Mr. Owens's comments about the Zoning Ordinance, she said that it largely parrots what KRS says. However, she noted that it parrots Section 5, not Section 6 (a) and (b). Ms. Jones stated that her interpretation is that the statute says that a governmental entity can enact an ordinance that would allow them to hear a zone change and conditional use request together, which LFUCG has done. However, the Zoning Ordinance does not include the next part of that statute, which states that, when that section is adopted, the text **shall** provide that the Planning Commission act as the Board of Adjustment; and that an applicant may elect to have variances or conditional use permits for the same development to be heard, and **finally decided** by the Planning Commission at the same public hearing. Ms. Jones stated that the statute should control the Zoning Ordinance, because the Ordinance came from the statute. She said that she believes that the Commission needs to determine that they have to hear the conditional use request. And, if they determine to hear, she believes that they also have to decide it. Ms. Jones added that the last line of Article 6-4(c) states that the Planning Commission has to act within 90 days of the application, unless the applicant chooses to postpone the request.

Mr. Brewer asked when the 90-day deadline would come up for this request. Mr. Saltee answered that this request was filed in late November, so this meeting would be the deadline. Mr. Brewer asked what options they would have, if they chose to hear the conditional use request today.

Motion: A motion was made by Mr. Penn and seconded by Ms. Plumlee to deny hearing the conditional use application filed with the zone map amendment for MARC 2014-1, for the following reasons:

1. After hearing legal arguments from all sides, the current conditional use application is the same as the previous conditional use application filed for the property at 8291 Old Richmond Road that is pending on appeal at the Fayette Circuit Court.
2. Hearing the conditional use at this time would create conflicts with the existing conditional use on the property, granted in 2000, and pending the issues that are being addressed by the Fayette Circuit Court.

Discussion of motion: Mr. Berkley asked if the intent of the motion was to hear the zone change request but not the con-

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ditional use. Chairman Owens answered affirmatively.

Ms. Blanton stated that it was her understanding that the petitioner "would not be able to do anything with the property" if the Commission were to hear the zone change, but not the conditional use. Ms. Jones added that, if that is how the Commission chooses to proceed, the existing 2000 conditional use permit would still be in effect, and the court cases would still be pending, but none of the uses proposed as part of the current conditional use permit request would be allowable.

Mr. Brewer asked how the 90-day deadline would affect the conditional use request if the Commission chooses to hear only the rezoning request. Ms. Jones responded that there would likely be some amount of legal argument about that issue. She added that the hearing of the zone change could start the clock for the appeals process to the Fayette Circuit Court, or an argument could be made that the Planning Commission chose not to act within the 90-day time frame. Mr. Brewer asked what could result from such an argument being made. Ms. Jones answered that someone might argue that the conditional use was effectively approved, if it is determined that the Commission chose not to hear it within the 90-day window. She added that this situation has never come up before with anyone she has spoken with in the planning/development community; so there is very little legal authority on it, and it is difficult to tell what might happen. Mr. Brewer asked for clarification of Ms. Jones's assertion that a refusal to act on the conditional use request could be construed as an approval. Ms. Jones responded that she believed that the Commission is being asked to make a decision about the conditional use; so it could be construed that a decision not to take action constituted a final action, which would then be appealable. She said that she would be remiss if she did not inform the Commission that it was possible for someone to make an argument that, by choosing not to hear the conditional use, the Commission has chosen not to take action on it within 90 days, therefore deeming it approved.

Mr. Penn stated that the findings of fact that he presented were drafted by Ms. Jones, who indicated that she could defend them if the Commission makes that choice. He said that he believed that there was a lot more to this issue than the zone change and conditional use requests, including the pending court cases, and that was the basis for his motion. Mr. Penn then stated that he would like to call the question.

Ms. Jones stated that she was asked to draft findings on this issue, so she did so; but that did not change her opinion, which she outlined previously.

Mr. Drake asked if the motion was to deny hearing the conditional use, rather than to deny the conditional use, and if there was a substantial difference between the two options in this instance. Ms. Jones answered that she was unsure, because she had never seen a situation like this. She said that, if that is the desire of the Commission, the Law Department would have to defend it that way if an argument is raised that the Commission chose not to take action in 90 days. She said that, usually, not taking action means that the governing body just does nothing with the request, but that is new for the Planning Commission. Ms. Jones stated that saying that the Commission does not want to hear the conditional use, as opposed to denying it after hearing it, were two completely different things.

Mr. Owens reiterated that Mr. Penn's motion stated, "I move that we deny hearing the conditional use application filed with the zone map amendment from A-R to A-N..."

Ms. Blanton asked if the presentation of the zone change, conditional use request, and development plan to the Planning Commission's sub-committees at their meetings several weeks ago would in any way undermine Mr. Penn's motion, because the process has already been started. Ms. Jones answered that the process was started, but the Commission had not yet held a public hearing.

Ms. Blanton stated that a decision by the Planning Commission to deny hearing the conditional use would essentially amount to postponing the request, which the Commission does not have the right to do without the applicant's consent.

Mr. Brewer stated that he did not understand what would happen if the Commission chooses not to hear the conditional use request at this time. Ms. Jones answered that, if the Commission does not hear the conditional use, the existing 2000 conditional use for the anglers' club would be the only allowable conditional use on the property, and the issues would remain in the court from the two earlier appeals. She said that granting or not granting the zone change would not affect the hearing of the factors of the conditional use. Mr. Brewer said that he believed that the Commission was in an untenable and indefensible position, since an argument could be made that their decision not to act could be construed as approval. Ms. Jones reiterated that she was not agreeing with the assessment that a decision not to act could constitute an approval, but she wanted the Commission to be aware that that argument could be made.

Mr. Owens asked Mr. Penn to repeat his motion. Mr. Penn did so, noting that it would eliminate hearing the part of the current request that is now tied up in appeals court.

Action: Mr. Penn's motion carried, 5-4 (Cravens absent; Berkley, Blanton, Brewer, and Drake opposed.)

Petitioner Comments: Mr. Murphy stated that he would like to request postponement of the zone change application until

the Commission's March 27th meeting.

Opposition Comments: Mr. Todd stated that his clients had no objection to the request for postponement of the zone change, but he wanted to ensure that the motion to continue did not include the conditional use.

Petitioner Comments: Mr. Murphy clarified that his request was for postponement, not for continuation. Mr. Murphy stated that he would like to officially register the petitioner's objection to the Commission's action to deny hearing the request for the conditional use permit. He said that he believed that such an action is clearly not allowed by Kentucky law; therefore, he and his client would like to respectfully object to that decision. Mr. Murphy added that he was aware that there was a great deal of "baggage" in this case, but the petitioner had hoped that the Commission could get past that, and consider the best use of the property. He said that the petitioner will use the 30-day postponement to decide how to proceed in the future.

Action: A motion was made by Mr. Penn, seconded by Ms. Plumlee, and carried 6-3 (Cravens absent; Berkley, Mundy, and Penn opposed) to postpone MARC 2014-1 to the March 27, 2014, Planning Commission meeting.

VI. **COMMISSION ITEMS** – No such items were presented.

VII. **STAFF ITEMS** – No such items were presented.

VIII. **AUDIENCE ITEMS** – No such items were presented.

IX. **MEETING DATES FOR MARCH, 2014**

Subdivision Committee, Thursday, 8:30 a.m., Planning Division Office (101 East Vine Street).....	March 6, 2014
Zoning Committee, Thursday, 1:30 p.m., Planning Division Office (101 East Vine Street).....	March 6, 2014
Subdivision Items Public Meeting , Thursday, 1:30 p.m., 2 nd Floor Council Chambers.....	March 13, 2014
Planning Commission Work Session, Thursday, 1:30 p.m., 2 nd Floor Council Chambers.....	March 20, 2014
Technical Committee, Wednesday, 8:30 a.m., Planning Division Office (101 East Vine Street).....	March 26, 2014
Zoning Items Public Hearing , Thursday, 1:30 p.m., 2 nd Floor Council Chambers.....	March 27, 2014

X. **ADJOURNMENT** – There being no further business, Chairman Owens declared the meeting adjourned at 4:04 p.m.

Mike Owens, Chair

Carla Blanton, Secretary

TLW/TM/CT/BJR/BS/src

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